Upon the whole record a different verdict could not have been rightly found. It is therefore unnecessary to examine the propriety of the rulings of the court in giving and refusing instructions, since a decision of that question could not affect the result. *Southern Ry. Co.* v. *Oliver,* 102 Va. 710, 47 S. E. 862; *Moore* v. *B. & O. Ry. Co.,* 103 Va. —, 48 S. E. 887, and cases cited.

The judgment complained of is plainly right, and must be affirmed. *Affirmed.*

SAVAGE et al. v. BOWEN et al.

Supreme Court of Appeals of Virginia.

February 2, 1905.

[49 S. E. 668.]

CONTESTING OF WILL—PERSONS ENTITLED—ADMISSION OF EVIDENCE—DISCRETION OF COURT—ATTESTATION OF WILL.

1. The grantee of an heir of testator has such an interest in the controversy as entitles him to contest a will found and filed for probate after the grant, by which testator devised the land to the grantor's children.
2. The will by which testator devised land to the children of her son, S., not having been probated, S. took the land as heir, and afterward conveyed it to plaintiff. After the death of S. his wife filed the will for probate, and it was admitted on her evidence as attesting witness. Plaintiff then brought suit to set aside the will. *Held,* that for the purpose of affecting her credibility it could be shown by the wife of S. that she joined S. in the deed to plaintiff.
3. Allowing a witness to be recalled for the purpose of laying the foundation for impeachment by contradiction is within the discretion of the court.
4. It is within the discretion of the trial court to allow bank officers to testify as experts as to handwriting and the difference in inks used in writing and signing a paper.
5. In a suit to set aside a will the admission of evidence as to the enhanced value of the land affected is error.
6. Code 1887, sec. 2544 [Va. Code 1904, p. 1297], provides: No will shall be valid unless in writing signed by the testator, or by some other person in his presence, and by his direction, so as to make it manifest that the name is intended as a signature; and, unless it be wholly written by the testator, his signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time, who shall subscribe to the will in the presence of testator. *Held* that if the attesting witnesses each signed the will in the presence of testator and of the other, it was not necessary that testator expressly requested each witness to sign the same.

Appeal from Circuit Court, Mecklenburg County.

Action by E. T. Bowen and another, administrators of George L. Savage, deceased, against the children of George L. Savage. From a decree for plaintiffs, defendants appeal. *Reversed.*

HARRISON, J.:

Ann C. Savage, of Mecklenburg county, departed this life in July, 1883, leaving a will, whereby she devised her tract of land in that county to her grandchildren, who are the appellants here. This will was dated the 7th day of June, 1883, and was in the following words:

"In the name of God, Amen. After the Bowen debt becomes due and is settled, then I give to G. L. Savage's children my tract of land on which he, Bowen, has a deed; it contains sixty acres more or less. I want Geog's children to have my land and its benefits: this is my wish and will."

Then follows the signature of the testatrix and those of two attesting witnesses, namely, N. C. Bugg and T. A. Savage.

On the 20th day of January, 1902, the will, upon the testimony of the subscribing witnesses thereto, was admitted to probate in the county court of Mecklenburg county.

In March, 1902, E. T. Bowen and B. E. Cogbill, administrator of George L. Savage, deceased, who are the appellees here, filed their bill in the Circuit Court of Mecklenburg county, in which they allege that Ann C. Savage died intestate, leaving surviving her George L. Savage as her only child and heir at law, and that upon her death the tract of land mentioned in the alleged will descended to him as her sole heir at law and next of kin; that after the death of his mother George L. Savage and his wife had sold and conveyed the land to the complainant Bowen by deed with general warranty dated December 4, 1890, and that he is now the owner of the same, as will appear from such deed, duly executed, recorded, and filed with the bill as a part thereof; that the estate of George L. Savage is interested in the matter of this alleged will by reason of his general warranty in the said deed to the complainant Bowen. They further allege that the paper in question, admitted to probate in the county of Mecklenburg, is not the true last will and testament of Ann C. Savage, and that, in view of their interest in the land passing by such pretended will, they desire to impeach the same and have it set

aside. The grandchildren of Ann C. Savage, who are the children of George L. Savage, deceased, are made parties defendant; and the prayer of the bill is that the alleged will may be declared null and void, and the complainants granted all the relief provided for under section 2544 of the Code of 1887 (Va. Code 1904, p. 1297), and such other further and general relief as the nature of their case may require.

The defendants demurred to and answered the bill, denying its material allegations, and insisting that the complainants had no interest in the estate of Ann C. Savage or the probate of her will, and further insisting that the controverted paper was the true last will and testament of Ann C. Savage.

The demurrer having been overruled, a jury was impaneled to try the following issue: "Whether any, and, if any, how much, of what was offered for probate at the January term, 1902, of the county court of Mecklenburg county, a copy of which, marked '1,' is filed with the plaintiffs' bill, is the last true will and testament of said Ann C. Savage." Upon this issue *devisavit vel non* the jury found for the contestants that the paper in question was not the true last will and testament of Ann C. Savage.

A motion to set aside the verdict was overruled, and the decree appealed from entered, adopting and approving the finding of the jury.

The demurrer was properly overruled. The allegations of the bill show such an interest in the subject-matter as entitles the appellees to impeach the will. Controversies of this character usually arise between persons claiming as heirs at law on the one hand and as devisees under the contested will on the other. George L. Savage, as heir of Ann C. Savage, would have had the right to impeach the will, and no reason is perceived why those claiming under and through him are not entitled to his rights in that respect.

The second assignment of error is that the court erred in admitting improper testimony.

Without referring in detail to the several bills of exceptions embracing these objections, we are of opinion that there was no error in proving by the witness T. A. Savage the deed from George L. Savage and wife to the complainant, E. T. Bowen, filed with the bill, and that the witness T. A. Savage had united with her husband, George L. Savage, in this deed conveying the land in question to

Bowen. This evidence was admitted solely for the purpose of affecting the credibility of the witness T. A. Savage, who was one of the attesting witnesses in the will; and the contestants had the right to ask any question which tended to test the accuracy, veracity, or credibility of the witness. *Va. etc. Wheel Co.* v. *Chalkley,* 98 Va. 62, 34 S. E. 976.

We are further of opinion that there was no error in allowing the witness A. W. Bracey to be recalled for the purpose of laying the foundation to contradict him, and afterwards permitting the introduction of witnesses to contradict him. The examination of witnesses lies chiefly in the discretion of the trial court, and its exercise is rarely, if ever, to be controlled by an appellate court. Much latitude of discretion should be allowed the trial court in the matter of recalling witnesses, and its action will not be reversed except for palpable error. *Burke* v. *Shaver,* 92 Va. 345, 23 S. E. 749.

We are further of opinion that there was no error in admitting the testimony of the two bank officers and the clerk of the circuit court as expert witnesses. These witnesses were introduced to state whether or not, in their opinion, the body of the will, the signature thereto, and the name of the attesting witness N. C. Bugg, were written in the same ink as the name of the attesting witness T. A. Savage, and which, in their opinion, was the older writing.

They testify to their long experience in handling and examining written papers and in comparing signatures and writings. It is the practice in this state to admit such evidence for the purpose mentioned. Indeed, with our courts, located as they are for the most part in the country, no better evidence on the subject is attainable. It would be impossible in most cases to secure a chemist or manufacturer of ink to say which of two writings was the older, or written with the older ink. Whether a witness is qualified to testify as an expert is largely a matter in the discretion of the trial court, and its ruling allowing a witness to testify will not be disturbed unless it clearly appears that he was not qualified. *Richmond Locomotive Wks.* v. *Ford,* 94 Va. 627, 27 S. E. 509.

We are further of opinion that it was error to admit the evidence objected to tending to show the enhancement in the value of the land in controversy since its purchase by the complainant Bowen. The sole issue before the jury was whether or not the controverted writing was the true last will and testament of Ann C. Savage.

The value of the land could have no bearing upon that question, and the evidence tending to show its enhancement was irrelevant, and calculated to divert the minds of the jury from the real issue.

The third assignment of error relates to the court's action with respect to the instructions.

The instructions given by the court, taken together, are predicated upon the view that it is essential to the due execution of a will that the attesting witnesses should have been requested by the testator to act in that capacity. They convey the impression—which appears to have been the view of the court—that the request must have been express; and that although every other statutory requisite may appear to have been complied with, the instrument will not be valid unless there shall also appear to have been an express request made by the testatrix to the witnesses to attest the same as and for her last will and testament, and that each should know that the other had been so requested.

The requirements for the due execution of a will are found in section 2514 of the Code, and are as follows: "No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence, and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly written by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe to the will in the presence of the testator —but no form of attestation shall be necessary."

The purpose of the statutory requirements with respect to the execution of wills was to throw every safeguard deemed necessary around a testator while in the performance of this important act, and to prevent the probate of a fraudulent and supposititious will instead of the real one. To effectually accomplish this, the statute must be strictly followed. It is, however, quite as important that these statutory requirements should not be supplemented by the courts with others that might tend to increase the difficulty of the transaction to such an extent as to practically destroy the right of the uninformed layman to dispose of his property by will.

As said by Judge Moncure in the case of *Parramore* v. *Taylor*, 11 Gratt. 220: "The law of wills should be plainly written, and no room should be left for doubt or implication. It is a law of almost

universal application, and must often be acted on by unlearned persons in a situation which precludes the possibility of obtaining professional aid. The most important family settlements, which are often postponed to the last day or hour of life, may depend upon an observance of its requisitions. How important, then, that it should impose no needless requisition; none that is not productive of some substantial good; and that it should plainly express what it means."

Prof. Minor, in his Institutes, says: "The statute is peremptory in requiring that the witnesses shall subscribe their names in the presence of the testator, and at his request." 2 Minor (4th ed.) p. 1017.

A casual glance at the statute shows that there is no peremptory requirement that the will shall be attested at the request of the testator; indeed, the word "request" does not appear in the statute. If the learned author means that the plain implication from the language used is that the witnesses must be requested by the testator to attest the will and it be true, as contended, that such request is necessary to the validity of a will, then the question arises, how is the fact that the request was made to be evidenced? We are of opinion that it may appear from the facts and circumstances surrounding the transaction, as well as by an express and formal announcement of the invitation.

In the case at bar it appears that T. A. Savage was the daughter-in-law of the testatrix, and that they lived together in the same house; that the will was executed in a small room, 10 by 12 or 14 feet. It further appears that the will was written by T. A. Savage at the earnest request of the testatrix. This witness, who was not asked if she had been requested by the testatrix to witness the will, testifies that when N. C. Bugg, who had been sent for to witness the will, arrived, she handed the will to the testatrix, who raised up in her bed without assistance, and signed the will in the presence of N. C. Bugg and herself; that, after the testatrix had signed the will, Mr. Bugg signed his name as witness, at the bed; and that she then took the will, and went over to the bureau, and signed her name under Mr. Bugg's at the bureau; that the testatrix signed and acknowledged the will in the presence of N. C. Bugg and herself; that N. C. Bugg signed his name thereto in the presence of the testatrix and herself, and that she signed her name thereto in the

presence of the testatrix and N. C. Bugg; that the testatrix, from the position occupied by her on the bed, could have seen the witness sign her name to the will at the bureau without changing her position, and simply by looking; that Mr. Bugg, from his position at the bed, could have seen her sign her name by simply turning his head; that the testatrix was in clear and strong mind at the time, mentally as sound as a dollar. The witness N. C. Bugg says that he was sent for to witness the will; that when he arrived the testatrix said to him: "Napoleon, I want you to witness my will. I want to give what I have to George's children, because I do not think he will take care of it;" that he did not see the testatrix sign the will, but that she acknowledged it as her will to him, in the presence of Mrs. T. A. Savage; that the testatrix raised up in bed, and her mind was clear and all right; that he went around to the foot of the bed and signed the will; that he signed it in the presence of Mrs. T. A. Savage and of the testatrix; that after he had signed it Mrs. T. A. Savage took the paper, and went with it to the bureau; that he could have seen her if he had turned his head and looked, but that he did not see her sign the paper; that the testatrix, from her position on the bed, could have seen Mrs. T. A. Savage sign the paper without change of her position, as the bureau sat in front of the bed. This witness further states that he does not remember anything being said about Mrs. T. A. Savage witnessing the will; that, if anything was said about it, he did not recollect it; that he did not know T. A. Savage was to be a witness; thought that Mr. Gregory was to be the other witness.

It is clear from the evidence that the testatrix knew that two witnesses to the will were necessary, and she and the two whose names are signed to the will were the only persons present at the time of the transaction. From this testimony, if true, the implication is plain that the witness T. A. Savage signed the will at the request of the testatrix, and the jury should have been instructed that, if they believe the same, it constituted all the proof necessary to show that T. A. Savage had been requested by the testatrix to attest the will.

The fourth instruction goes a step further, and tells the jury that it is necessary for them to believe from the evidence that the testatrix had authorized or requested T. A. Savage to subscribe her name to the paper as an attesting witness before she attested the same.

The vice in this instruction, in addition to the inference that an express request was necessary, is the proposition that such request must have been made at some time prior to the act of attesting the will. This position is not tenable. The request might have been made at the time the will was being subscribed as well as before; or the testatrix might have acquiesced in and ratified the act of attestation at the time it was done. In this case the witness T. A. Savage wrote the will at the urgent request of the testatrix, and signed it as a witness in the plain view and conscious presence of the testatrix, without objection on her part; and yet the jury are told that, though they believe these facts, they must find against the validity of the will.

In addition to the general objection pointed out, the sixth instruction is erroneous, because it, in effect, tells the jury that at some time prior to the signing each of the witnesses must have known that the other was to be an attesting witness, and each must also have known that the other had been requested to act in that capacity. This instruction imposes unnecessary requirements, not called for or suggested by the statute, which would be likely to defeat the probate of many otherwise valid wills. The witness T. A. Savage, who wrote the will, may have been asked to attest it before N. C. Bugg came to the house, and, unless the request was repeated in his presence after his arrival, and at some time prior to the act of signing, the jury could not, under this instruction, find in favor of the validity of the will.

As said by Judge Moncure in *Parramore* v. *Taylor, supra*: "Nothing is more common or natural than for a scrivener to subscribe a will as a witness before his fellow witness is called in to join him in the attestation; or for a witness called on to attest a will, after doing so, to turn his back, and walk off, without noticing what is done by others afterwards."

In the matter of executing a will the statutory requirements must be complied with, but substance must not be sacrificed to form, and the end of the law to the means used for attaining it.

For these reasons the decree appealed from must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial of the issue *devisavit vel non* in accordance with the views herein expressed. *Reversed.*

NOTE.—Special attention is called to the point decided in the above case that, to meet the requisites of sec. 2514 Va. Code 1904, a witness need not be *expressly* requested to attest the will. As it was not necessary to the decision of the case, the court refrained from passing on the question of whether any request at all be necessary; but, from the language used, it is believed that the court would have gone to this extent had it been necessary.

In the case of *Cheatham* v. *Hatcher*, 30 Gratt. 56, it was decided that, a request to a witness to subscribe to a will, made by a third person in the hearing of the testator, is, in law, the request of the testator, if he be conscious and does not dissent therefrom. And in *McMechen* v. *McMechen*, 17 W. Va. 683 (decided under ch. 77, sec. 3, W. Va. Code 1899, which is identical with sec. 2514, Va. Code 1904, except that under the W. Va. statute the witnesses must subscribe to the will in the presence of each other), it was held that it is not necessary that the testator shall actually assent to the attestation, but when it is made, he must be in a mental and physical condition which will enable him to dissent from the attestation if he desires; and if his condition is such that he could give dissent or disapproval, if he desired to do so, but did not, his assent will be implied.

On the general subject of signing and attesting a will, it may be said that the statute does not require the signature to be at the foot of the will; but it is an equivocal act if placed anywhere else and unless it appears affirmatively from something on the face of the paper that it was intended as a signature it is not sufficient. *Ramsey* v. *Ramsey*, 13 Gratt. 664; *Waller* v. *Waller*, 1 Gratt. 466; *Roy* v. *Roy*, 16 Gratt. 418; *Warwick* v. *Warwick*, 86 Va. 596; *Perkins* v. *Jones*, 84 Va. 362; *Selden* v. *Coalter*, 2 Va. Cas. 553.

Where the names of subscribing witnesses have been placed to the will without any form of attestation whatever, and the witnesses have forgotten what has occurred at the time the will was executed, the law will presume that every requirement of the statute was complied with, and this is especially true where the attestation shows that they were so complied with. *Webb* v. *Dye*, 18 W. Va. 376. See also *Clarke* v. *Dunnavant*, 10 Leigh 13; *Young* v. *Barner*, 27 Gratt. 106.

For further discussion of this section, see 2 Va. Law Reg. 469; notes to sec. 2514, Va. Code 1904; and Justis' Annotations to ch. 77, sec. 3, W. Va. Code.

G. C. G.